Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Arnold M. Foss, Petitioner,

v.

Elizabeth Morada Foss, Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED

Is lien stripping of an otherwise valid obligation created by a divorce decree a violation of Petitioner's Fifth Amendment Due Process Rights when the lien's value is determined during a lien avoidance motion without specific notice or hearing as required by 11 U.S.C. § 506(a) and when the collateral's value should be determined at plan confirmation?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ARNOLD M. FOSS, Petitioner,

v.

ELIZABETH MORADA FOSS, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arnold M. Foss respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A.) is unreported. The opinion of the District Court (App. B.) is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 4, 1998. An ordering denying a timely filed

Petition for Rehearing with Suggestion for Rehearing En Banc was filed with the Court of Appeals on August 5, 1998 (App. C.).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 158(a).

The parties were granted a divorce on February 21, 1995 by the Superior Court, King County, State of Washington. The court determined that while title to the property remained in respondent's name, the community had made contributions resulting in a $20,000 community property interest therein. The decree awarded the real property to respondent subject to petitioner's $20,000 judgment lien, which had been the community's interest.

The decree required respondent to make an initial $3,000 payment to petitioner by March 31, 1995 with the remaining $17,000 due December 31, 1997. The decree granted petitioner a 9% return on the outstanding balance effective April 1, 1995.

Petitioner received no other significant marital property nor any portion of the $20,000 awarded in the divorce court.

The respondent filed her Chapter 13 petition on April 17, 1995, less than one (1) month after the first $3,000 installment was due. Respondent listed the real property as exempt under Washington law. Respondent proposed no payment to petitioner whatsoever; her only reference to the claim was in her Statement of Intention wherein she declared the lien would be avoided pursuant to 11 U.S.C. § 522(f)(1)(A) -- a judicial lien impairing her homestead exemption.

The lien avoidance hearing was held July 10, 1995 (App. D). The court denied respondent's motion to avoid the lien.[1] However, the court then proceeded, sua sponte, to determine what portion of petitioner's lien claim it deemed secured (App. E.)

On August 7, 1995, petitioner filed his $20,000 proof of claim.

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[1] The bankruptcy court's denial of respondent's § 522(f)(1)(A) motion was affirmed on appeal. See *In re Foss*, 200 B.R. 660 (B.A.P. 9th Cir., 1996).

On October 4, 1995, respondent objected to the claim asserting it was secured for $8,946.77 while $11,053.23 was unsecured as determined in the July 1995 hearing. On November 13, 1995, the court reclassified petitioner's claim, over his objection, into a secured claim for $8,946.77 and a $11,053.23 general unsecured claim.[2]

The respondent does not have a confirmed plan nor has a § 506(a) hearing been held[3].

The court of appeals and district court affirmation of the bankruptcy court order bifurcating Petitioner's lien claim does not conform to the specific notice requirements of the Eleventh and Fourth Circuit or the valuation timing used by a majority of Courts since *Dewsnup*.

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[2] At the November 13, 1995 Hearing, the Court stated that it did not intend to revisit the valuation issue "The issue is going to be the same – no matter what."

[3] Respondent's counsel acknowledged during oral argument before the ninth circuit that no § 506(a) hearing has ever been held to determine what portion of the petitioner's claim was deemed an allowed secured claim.

REASONS FOR GRANTING THE PETITION

I. The Question Presented Is Important.

Justice Kennedy, in his concurring opinion in *Farrey v. Sanderfoot,* writes that the Bankruptcy Code may be used in a later case to permit a spouse to avoid an otherwise valid obligation under a divorce decree, which may create an unjust result. 500 U.S. 291, 303, 111 S.Ct. 1825, 1832-1833, 114 L.Ed.2d 337, (1991).

Here, the respondent seeks to do just that. This petition arises from a lien avoidance motion similar to Mr. Sanderfoot's. However, while the respondent's motion was denied, and upheld on appeal, she was permitted to use the § 522(f)(1) motion as the sole basis to lien strip petitioner's property rights without affording him the procedural and substantive protections of § 506(a), Bankr. 3012 and due process clause of the Fifth Amendment.

The decisions of the lower courts, herein, stand for the proposition that specific notice and due process are not required, and that the petitioner should have figured out from the circumstances what the result would be. This Court practice is a

significant departure from the accepted and usual course of judicial proceedings and is contrary to the reasoning and cases set forth.

Whenever a former spouse seeks to use the code for such purposes vigilance is required.

II. The Decision of the Court of Appeals conflicts with the Fourth and Eleventh Circuits on the specific notice requirement of § 506(a) and the procedural requirements of Bankruptcy Rule 3012.

The only notice petitioner received was notice of a motion to avoid a lien. The respondent has never filed a § 506(a) motion.

In *Calvert*, the Eleventh Circuit stated that § 502(a) governs the allowance of secured and unsecured claims but § 506(a) governs the determination by the bankruptcy court of the secured status of an allowed claim. *In re Calvert*, 907 F.2d 1069, 1071 (11th Cir. 1990).

> The phrase "value of such creditor's interest" in § 506(a) simply refers to the value of the collateral securing the debt. (Citing *United Savings Association of Texas v. Timbers of Inwood Forest Associates Ltd.*, 484 U.S. 365,

372-373, 108 S.Ct. 626, 630-631, 98 L.Ed. 740, 749 (1988)).

Id. at 1071-1072.

Under *Calvert*, Bankruptcy Rule 3012 provides the procedural framework for valuing collateral as part of a § 506(a) hearing. Bankruptcy Rule 3012 requires specific notice that a court will determine the extent to which a claim is secured.

> Thus, according to the language of the rule, the bankruptcy court must act only in conjunction with a hearing on notice to the holder of the secured claim. *See also,* App. 1 *Collier on Bankruptcy* 1354 (15th ed. 1989). Section 506(a) approves of holding this hearing in conjunction with the confirmation plan, as was done here; there is no requirement of a separate hearing. However, Rule 3012 requires that specific notice be given that the bankruptcy court will determine the extent to which the claim is secured. Mere notice that the bankruptcy court will hold a

> confirmation hearing on a proposed bankruptcy plan, without inclusion of notice specifically directed at the security valuation process does not satisfy the requirement of Rule 3012.

Id. at 1072.

See also, *In re Windfelder* 82 B.R. 367, 369-370 (Bankr.E.D.Pa. 1988), the better procedural practice is to use Bankr. Rule 3012 to implement the substantive rights created by § 506(a) by filing a motion to value. Windfelder also cites the advisory notes of Rule 3012.

In re Linkous, 990 F.2d 160 (4th Cir. 1993) cites *Calvert* as the proper application of Rule 3012 to § 506(a). *Linkous* affirmed a district court ruling that a creditor had not received adequate notice. *Linkous* held that a plan confirmed without specific notice directed at the security valuation process violated the creditor's Fifth Amendment due process rights.

> The United States Supreme Court has concluded that "[a]n elementary and fundamental requirement of due process in any proceeding

> which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (citing *Mullane v. Central Bank & Trust*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)). (citations omitted).

Id., at 162.

Under *Linkous* notice must reasonably convey the required information.

> A debtor should inform a *secured* creditor of an intent to reclassify its claim into a secured and unsecured claim.

Id., at 163.

Calvert and *Linkous* stand for the correct rule on the specific notice requirements of § 506(a) and the procedural requirements of Bankruptcy Rule 3012.

The Ninth Circuit ruling does not conform to the principles set forth in the Eleventh and Fourth Circuit opinions. Without a § 506(a) notice and hearing how can there be a reclassification of petitioner's claim? The Ninth Circuit opinion cannot be reconciled with the Eleventh and Fourth opinions on due process.

III. The Ninth Circuit's ruling on when valuation occurs is erroneous; its ruling adds further confusion to the competing theories on valuation; the Court should accept the petition in order to adopt a consistent valuation approach for courts to apply in future cases.

The Ninth Circuit cites *Matter of Seip* for the rule that the proper frame of reference for determining value in § 506 is *'the date of plan effectiveness'* but that does not mean that the bifurcation proceeding must coincide with this date. Respectfully, the Ninth Circuit misreads *Seip*; *Seip* holds that the secured amount of a claim should be determined by valuing collateral as of the confirmation date. *Seip* is the majority view on valuation. By using the language "value is determined at the date of plan

effectiveness" the Ninth Circuit has adopted a valuation theory that *Seip* does not embrace[4]

Matter of Seip holds that a § 506(a) valuation should be held at or near plan confirmation and any prior valuation is not *res judicata*. 116 B.R. 709, 712 (Bankr. D.Neb. 1990). *Seip* cites *Ahlers v. Norwest Bank Worthington, (In re Ahlers)*, 794 F.2d 388, 399, (8th Cir. 1986), (citing 11 U.S.C. § 506(a)), rev'd on other grounds, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988), as authority that value is determined at confirmation. *Id.*, at 711. According to *Seip*, the Supreme Court's reversal does not lessen the precedential value of *Ahlers*. Value should be determined in close proximity to confirmation.

> If the amount of a secured creditor's allowed secured claim were to be conclusively determined by the value of collateral on the date the bankruptcy petition was filed, and such amount could not be redetermined during the

[4] For a comprehensive view of the competing valuation theories, see, *In re Wood*, 190 B.R.788 (Bankr. M.D.Pa. 1996).

> course of the bankruptcy case, the language of § 506(a) would be rendered meaningless in the context of confirmation proceedings. This is contrary to overall statutory scheme.

Id.

Seip rejects the date of filing theory adopted by *In re Beard*, 108 B.R. 322 (Bankr. N.D.Ala. 1989); *Beard* does not recognize the essential principle of § 506(a).

> Findings of fact as to the amount of an allowed secured claim on the date a case was filed, as determined under § 502(b) in the context of an objection to claim, are not binding as to the value of collateral on a later date or as to value in other contexts. The allowed amount of a secured claim will increase, to the extent of an equity cushion, as interest and allowed expenses accrue under 506(b). The allowed secured claim will decrease as collateral drops in value. Under the rule of decision in *In re Beard*, if collateral drops in value

> between commencement of the case and confirmation of a plan, the amount of the allowed secured claim under the plan would be greater than the value of the collateral on the confirmation date. That is an absurd result which is inconsistent with § 506(a) and with the overall statutory scheme.

Id. at 712.

Seip is the majority view.

In re Kennedy recognized the division among the competing valuation theories by asking if collateral securing a claim is valued at filing, at the confirmation hearing or at the effective date of the plan? 177 B.D. 967, 972 (Bankr. S.D.Ala. 1995). *Kennedy* divided the theories into: (1) date of filing, (2) effective date of plan or, (3) date of confirmation. *Kennedy* determined the date of confirmation theory as the correct method when a creditors hold security for a debt.

> The...date of confirmation theory, says the issue is one which must take into account a variety of

bankruptcy code sections and purposes to arrive at the correct result. It is the majority view. (cites omitted). These cases start their reasoning at the same Code section as the *Beard* cases. § 502(b) is explicit. Claims are to be allowed as of the date of the filing of a debtor's bankruptcy petition. All creditors' claims against a debtor must be fixed as of that date. However, if a creditor holds security for a debt, his total claim may be composed of one or two parts – secured and/or unsecured. When a court determines the split between the secured and unsecured parts of a creditor's total claim is where the *Johnson* and *Beard* analyses diverge. According to *Beard*, that determination is made once – as of the case filing. According to *Johnson*, the amount of the entire claim against the debtor is fixed as of the filing of the petition; the value of the security and thus the amount of

> the claim which is secured may change throughout the case.

Id. at 971-972.

Under the majority view, while the amount of a claim is fixed at petition filing, the value of security, and amount of the allowed secured claim, can change throughout the proceeding.

Kennedy is of the view that the Supreme Court and *Calvert*, have recognized these differences in valuation theories, and likely agree with the majority view.

> Although not explicitly ruling on this issue, the Supreme Court and Eleventh Circuit have in recent years referred to this issue in a manner which suggest their likely agreement with the *Johnson* theory [date of confirmation] theory.[5]

Id. 972-973.

Kennedy cites *Seip*.

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[5] See *Rake v. Wade* 508 U.S. 464, 472, N.8, 113 S.Ct. 2187, 2192, N.8, 124 L.Ed.2d 424 (1993). (Overruled, Pub. L. No. 103-394, enacted under the Bankr. Reform Act of 1994, § 1322(e)).

In re Stanley, also recognized the valuation timing issue by stating: a majority of courts before and after *Dewsnup* hold collateral should be valued at or near the plan's confirmation or effective date. 185 B.R. 417, 425 (Bankr. D. Conn. 1995). (cites omitted).

Stanley cites, *In re Woolley's Parkway Center, Inc.*, 147 B.R. 996, 1002 (Bankr. M.D.Fla. 1992):

> [t]o accept the proposition that a valuation at the beginning of a case is cast in concrete and is the law of the case for all purposes not only defies logic but is clearly contrary to the specific language of § 506 of the Code.

Id., at 424-425.

According to *Stanley*, valuation should await the confirmation hearing under the facts of each case. (Cite omitted).

Stanley also cites *Seip*, *Ahlers* and *Linkous*.

The Supreme Court decision, *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148, (1997) is

consistent with this analysis and the majority or date of confirmation theory.

Rash reasons that if a creditor does not accept the plan, the debtor must surrender the property securing the claim or invoke "cram down" under § 1325(a)(5)(B). If the debtor elects to keep the property over a creditor's objection,

> ...the creditor retains the lien securing the claim, see § 1325(a)(5)(B)(i), and the debtor is required to provide the creditor with payments, over the life of the plan, that will total the present value of the allowed secured claim, *i.e., the present value of the collateral,* see § 1325(a)(5)(B)(ii). The value of the allowed secured claim is governed by § 506(a) of the Code.

520 U.S. 953, _ _ _,117 S.Ct. 1879, 1882, 1883, 138 L.Ed.2d 148, 155 (1997).

A collateral's value should be determined "in conjunction" with the confirmation hearing on the proposed plan not at petition filing, and certainly not at a lien avoidance hearing held in July 1995 without any specific notice. Until there is a proposed plan

and a hearing date for plan confirmation there can be no proper valuation pursuant § 506(a) and § 1325(a)(5)(B).

The ninth circuit opinion is erroneous; it does not properly analyze the interrelationship between the claims allowance process, a claim's secured status under § 506 or the valuation process at plan confirmation[6]

In the present case, a sua sponte value was determined before the petitioner even filed his proof of claim making the claims allowance process meaningless; further, there has never been a § 506(a) hearing or a date set for plan confirmation even though the petition was filed almost four years ago.

The ninth circuit ruling is contrary to these opinions set forth, it conflicts with the eighth circuit, a majority of bankruptcy case law, and it is asserted, the eleventh circuit and Supreme Court views on valuation pursuant to § 506(a) and § 1325(a)(5)(B).

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[6] See *In re Palombo Farms of Colorado, Inc.*, 43 B.R. 709, 711 (Bankr. 1984) a claim is not allowed until a direct or indirect order of allowance is made. The mere filing of a proof of claim does not operate as an allowance because allowance is a judicial act. An objection to a claim without a court determination on the claim and objection is not an "allowed claim" so as to trigger § 506(a) (cites omitted).

CONCLUSION

The petition for a writ should be granted.

Respectfully submitted this 3rd day of November, 1998.

Timothy Neal Callahan

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— APPENDIX A —

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ELIZABETH MORADA FOSS,	) No. 96-35592
Debtor,	) D.C. No. CV-95-02084-CR
ARNOLD FOSS,	) **MEMORANDUM**[*7]
Appellant,	
vs.	
ELIZABETH MORADA FOSS,	
Appellee.	

Appeal from the United States District Court

For the Western District of Washington

Carolyn R. Dimmick, District Judge, Presiding

Before: BRUNETTI, RYMER, and KLEINFELD, Circuit Judges.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[7] Memorandum filed June 4, 1998 Cathy A. Catterson, Clerk U.S. Court of Appeals.

Creditor Arnold Foss appeals the district court's order affirming the bankruptcy court's decision to reclassify his claim of a marital lien of $20,000 filed in the Chapter 13 bankruptcy of his former wife, Debtor Elizabeth Foss. Arnold Foss' claim was reclassified under 11 U.S.C. § 522(f)(1) and § 506 to $8,947 secured claim and a $11,053 unsecured claim, based on the appraised value of Elizabeth Foss' townhouse. We have jurisdiction, 28 U.S.C. § 158(d), and we affirm.

We review de novo the district court's decision of an appeal from a bankruptcy court. See In re Lazar, 83 F.3d 306, 308 (9th Cir. 1996). We review the bankruptcy court's conclusions of law de novo and review its findings of fact for clear error. See id. The bankruptcy court's interpretation of the bankruptcy statute is reviewed de novo. See United States v. Case, 115 B. R. 666, 668 (BAP 9th Cir. 1990).

Appellant Arnold Foss argues that the bankruptcy court erred in reclassifying and bifurcating his claim because he lacked adequate notice that bifurcation was contemplated by the bankruptcy court. His arguments are unpersuasive.

The United States Supreme court has concluded that: "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950). The notice Mr. Foss received satisfies due process. Further, as Mr. Foss, his attorney, and his real estate expert were all present at, and participated in, the valuation hearing, we find that any alleged deficiency in notice was thereby waived. Neither has Foss shown any prejudice, as he contested valuation for purposes of deciding whether this lien impaired Mrs. Foss's exemption, and he did not suggest to the bankruptcy court nor to us how it would be different for cramdown purposes.

Appellant also argues that § 506 prohibits bifurcation of divorce decree-based secured claims. This is not the case. Liens created by divorce decrees are judicial liens as that term is defined by § 101(36) of the Bankruptcy Code, see In re Catli, 999 F2d

1405, 1406 (9th Cir. 1993), and judicial liens may be bifurcated under § 506. A judicial lien means a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding. 11 U.S.C. § 101(36). Accordingly, Mr. Foss had a judicial lien because it required judicial action for its creation.

Finally, Mr. Foss argues that the bankruptcy court erred because the § 506 valuations can only be made when the bankruptcy plan is confirmed. This argument lacks merit. Speaking directly to the valuation process, § 506 requires that "[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a). It does not, however, explicitly state at what point in time the valuation should occur. Case law interprets this language as mandating that valuation be determined "as of" the effective confirmation date. See, e.g., Matter of Seip, 116 B.R. 709 (Bkrpcy. D. Neb 1990); In re Minick, 63 B.R. 440 (Bkrpcy. D. Dist. Col. 1986). This simply means that the proper frame of reference for determining value in the § 506 bifurcation proceeding is the date of plan effectiveness, but does not mean that the

bifurcation proceeding itself must coincide with this date. Accordingly, the bankruptcy court did not err in holding the valuation hearing prior to the plan confirmation.

For the above stated reasons, we affirm the district court's order affirming the bankruptcy decision bifurcating and reclassifying Mr. Foss' marital lien. AFFIRMED.

— APPENDIX B —

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

In re:	
ELIZABETH MORADA FOSS,	) Dist. No. C95-2084D
	)
Debtor,	) Bankr. App. No. 95-068
	)
	) Bankr. No. 95-03216
ELIZABETH MORADA FOSS,	)
	) **ORDER AFFIRMING**
Appellee,	) **BANKRUPTCY**
vs.	) **COURT**
	) **DECISION**[8]
ARNOLD M. FOSS,	)
	)
Appellant.	)
	)

THIS MATTER is before the Court on appeal from a decision of the bankruptcy court, the Honorable Thomas T. Glover, presiding. After full consideration of the brief filed by counsel and the designated record, the Court affirms the bankruptcy court's

[8] Ordered filed May 3, 1996, Carolyn R. Dimmick, Chief Judge, U.S. District Court, Western District of Washington at Seattle.

decision segregating appellant's interest into a secured and an unsecured portion.

The facts are undisputed. Debtor Elizabeth Morada Foss and creditor Arnold M. Foss were granted a divorce on February 21, 1995. As part of the decree, Mr. Foss (appellant) was awarded $20,000 to be secured by property in Ms. Foss' name at 4733 Martin Luther King Jr. Way South.

On April 17, 1995, Ms. Foss filed a chapter 13 bankruptcy. In her petition, she stated that her $30,000 homestead exemption would be impaired by Mr. Foss' lien. Pursuant to 11 U.S.C. § 522(f), Ms. Foss moved to avoid Mr. Foss' lien as impairing her homestead. A hearing was held before Judge Glover on July 10, 1995, at which both sides presented expert opinion as to the value of the property, and at which Judge Glover valued the property and denied the motion to avoid.

Judge Glover issued a written order on August 11, 1995 (drafted by appellant) reflecting his earlier decision:

> It is hereby ordered that creditor Arnold M. Foss' lien as granted under King County Superior Court cause

No. 93-3-09709-7 is not avoidable, and that the court holds *In re Yerrington*, 144 B.R. 96 (9th Cir. BAP 1992) as authority for its ruling.

It is further ordered that the debtor property is valued at $58,500.

Upon issuance of that order, Ms. Foss appealed to the BAP for failure to recognize her homestead. This appeal is presently pending.

Mr. Foss filed his proof of claim on August 7, 1995, for $20,000. Ms. Foss objected to his claim on the basis that only $8,946.77 was a secured claim, and $11,053.23 was unsecured. The secured claim is the value remaining when an outstanding mortgage in the amount of $49,553.23 is deducted from the $58,500 value previously assigned to the property by Judge Glover. On November 13, 1995, pursuant to 11 U.S.C. § 506(a), Judge Glover reclassified Mr. Foss' claim over his objection based on the valuation the court had made in its August order.

It is ordered that the claim of Arnold Foss be reclassified as two claims, one secured claim in the

amount of $8,946.77; and one general unsecured claim in the amount of $11,053.23.

Appellant, Mr. Foss, contests the November 13 order on the basis that it should not have been based on the valuation determined at the July 10 hearing and reflected in the August 11 order (never appealed), because: (1) he was not given notice in the motion for avoidance pursuant to § 522(f) that the valuation would apply to § 506(a) (determination of secured status); and (2) that an adversarial hearing is required for determination of secured status under § 506(a) and thus, the valuation was in violation of constitutional due process and contrary to Bankruptcy Rule 3012.

It is Ms. Foss' and Judge Glover's position that there would have been no purpose to the bankruptcy court's valuing the property at the avoidance hearing (July 11) unless the court intended to value the property for purposes of determining creditor's secured interest. This is reflected in Judge Glover's questions to creditor's counsel at the November 13 hearing: "What did you think we were doing that day? . . . Why would we talk about value if the court were simply to say you can't avoid the lien

under (f) (1)? . . . Why would I even entertain valuation information if I were to conclude at the end of the hearing that this was a nonavoidable lien, and because it was not avoidable it simply had to be paid in full?"

Transcript at 5-7.

This is the issue on appeal as described by appellant:

> Whether Appellee is required to give specific notice of her intent to value appellant's claim as secured or unsecured, when debtor's prior 522(f)(1)(A) motion sought to avoid appellant's lien as impairing her homestead exemption, when appellant was not put on specific notice of debtor's intent to use said motion for the purpose of bifurcating his claim, and when Bankruptcy Rule 3012, 11 U.S.C. § 506(a), case law, and constitutional due process require specific notice of a debtor's intent to value a claim for such relief under a Chapter 13 plan?

Appellant, Mr. Foss, cites to the necessary notice to satisfy due process requirements:

> An elementary and fundamental requirement of due process is any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950). Additionally, he cites to a number of cases holding that a party is entitled to notice in bankruptcy proceedings. See, e.g., In re Linkous, 990 F2d 160 (9th Cir. 1993): In re Calvert, 907 F.2d 1069 (11th Cir. 1990). Appellant, however, was given sufficient notice to satisfy due process and bankruptcy case law.

He was given notice of the valuation of the property at the July hearing and was given an opportunity to present evidence and did so. Also, appellant was given notice of the § 506(a) hearing, and notice that it was the debtor's intent to deduct some $49,000 owing on the mortgage.

The Clerk of the Court is directed to send copies of this Order to the Honorable Thomas T. Glover, U.S. Bankruptcy Judge,

Clerk, U.S. Bankruptcy Court for the Western District of Washington, and all counsel of record.

DATED this 3 day of May, 1996.

Carolyn R. Dimmick, Chief Judge.

— APPENDIX C —

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ELIZABETH MORADA FOSS,	)	No. 96-35592
	)	
Debtor,	)	D.C. No. CV-95-02084-CR
	)	
ARNOLD FOSS,	)	**ORDER**[9]
Appellant,	)	
vs.	)	
ELIZABETH MORADA FOSS,	)	
Appellee.	)	

Before: BRUNETTI, RYMER, and KLEINFELD, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

[9] Order filed August 5, 1998, Cathy A. Catterson, Clerk U.S. Court of Appeals.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

— APPENDIX D —

UNITED STATES BANKRUPTCY COURT FOR THE

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN Re:	) Bankruptcy No. 95-03216
	)
Elizabeth Morada Foss	) NOTICE AND MOTION TO
Address: 4733 Martin Luther King Jr. Way South, Seattle, WA 98108	) AVOID LIENS UNDER 11 U.S.C. SECTION 522(f)(1)(A)
SSN: 534-60-4520	)
Debtor/s	)
_____	)

NOTICE OF DEBTOR'S MOTION TO AVOID LIENS

TO ALL PARTIES IN INTEREST:

PLEASE TAKE NOTICE that the debtor herein, Elizabeth Morada Foss, by and through her counsel of record, Lisa L. Walterskirchen, has filed a motion to avoid a lien pursuant to 11 U.S.C. 522(f)(1)(A).

PLEASE TAKE FURTHER NOTICE that if you wish to object to said motion, you must file an objection in writing with the clerk of the United States Bankruptcy Court for the Western District of Washington, 3rd Floor, Park Place Bldg., 1200 6th Avenue Seattle Washington 98104, **no later than June 5, 1995,**

and must request a hearing to be held on said motion no later than **June 8, 1995** before such court, or the court may enter an order allowing the motion of debtors and avoiding the judgment lien of Arnold Foss pursuant to 11 U.S.C. Section 522(f)(1), as requested on the attached motion.

MOTION:

TO AVOID LIEN PURSUANT TO 11 U.S.C. 522(f)(1)(A)

COMES NOW debtor herein, Elizabeth Morada Foss, by and through her counsel of record, Lisa L. Walterskirchen, and pursuant to § 522(f) of the Bankruptcy Code, requests the court to avoid the judgment lien of Arnold Foss on debtor's interest in real estate located at 4733 Martin Luther King Jr. Way S., in Seattle Washington, and in support thereof, states as follows:

1. The debtor has an ownership interest in the real property located at 4733 Martin Luther King Way South in Seattle Washington. This property is debtor's residence, in which she has claimed a homestead exemption in her statements and schedules, filed with this court on April 17, 1995.

2. This property was owned by debtor as her separate property prior to her marriage to Arnold Foss, and remained her separate property during their marriage. Please see **Exh. E. & F,** true and correct copies of which are attached to the Memorandum and incorporated therein by reference.

3. This property is subject to a first Deed of Trust to Mountain States Mortgage Company in the approximate amount of fifty one thousand dollars ($51,000.00).

4. Debtor believes this property to have a sale value of no more than seventy-two thousand dollars ($72,000.00). Please see **Exhibit A**, The King County Property Tax Profile, and **Exhibit B**, the Comparative Market Analysis prepared by Skyline Properties, true and correct copies of which are attached to the Memorandum in Support and incorporated therein by reference.

5. Debtor's equity in this real property, prior to the lien which debtor seeks to avoid, is approximately Twenty-one thousand dollars ($21,000.00). Debtor has selected the Washington State exemptions, therefore her $30,000.00 homestead exemption is impaired by this lien.

6. The judgment lien in favor of Arnold Foss secures a property settlement. Please see **Exhibit C**, Findings of Fact and Conclusions of Law in Foss v. Foss, and **Exhibit D**, page 8 of the Verbatim Report of Proceedings in Foss v. Foss, true and correct copies of which are attached to the Memorandum in Support and incorporated therein by reference.

WHEREFORE, the debtor respectfully requests that this court, pursuant to the authority of 11 U.S.C. 522(f)(1), after a hearing if requested by any objecting party or ordered by the court, enter on order avoiding the judgment lien in favor of Arnold Foss against Elizabeth Foss' home located at 4733 Martin Luther King Way South in Seattle Washington, for the reason that said lien is a

judgment lien securing a property settlement and impairs debtor's homestead exemption.

DATED THIS 12th day of May 1995.

Lisa L. Walterskirchen, WSBA #15382

Attorney for debtor

— APPENDIX E —

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: ELIZABETH MORADA FOSS	)	
	)	
Debtor.	)	95 3216
	)	
	)	

A PORTION OF THE TRANSCRIPT
BEFORE THE HONORABLE THOMAS GLOVER
JULY 10, 1995

THE COURT: All right, well, I can tell you first of all that this is not an avoidable lien because I think in – in the Ninth Circuit particularly, *Yerrington* controls, and I don't think it makes any difference whether or not it is community property – well, in fact, it isn't in *Yerrington*. Similar law in Alaska where you have a situation where both of the interests are really being created at the

time of the dissolution, and so I don't think you can avoid the lien under 522.

Now in terms of fixing a secured claim, that's another issue, and we'll deal with that issue. . . .

Deborah K. Enfield

Court Reporter EN-FI-ED-K499BW

— APPENDIX F —

UNITED STATES BANKRUPTCY COURT FOR THE

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN Re:	)	Bankruptcy No. 95-03216
	)	
ELIZBETH MORADA FOSS	)	ORDER RECLASSIFYING
	)	CLAIM
Debtor/s	)	
	)	

THIS MATTER having come on regularly before the undersigned Bankruptcy Judge upon the motion of debtor herein, after due notice and hearing, based upon the arguments of counsel and the evidence submitted to this court,

IT IS ORDERED that the claim of Arnold Foss be reclassified as two claims, one secured claim in the amount of $8,946.77 and one general unsecured claim in the amount of $11,053.23.

DATED this 13th day of November, 1995.

The Honorable Thomas T. Glover, United States Bankruptcy Judge

Lisa Walterskirchen, WSBA #15382

Herb Satterlee, Jr., Chapter 13 Trustee

— APPENDIX G —

11 U.S.C. § 502(a)(b)

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under § 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under Chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in lawful currency of the United States in such amount, except to the extent that— …

— APPENDIX H —

11 U.S.C. § 506(a)

§506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to

setoff under Section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

— APPENDIX I —

11 U.S.C. § 1325(a)(5)(B)(i), (ii)

§ 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or …

— APPENDIX J —

Bankruptcy Rule 3012

Rule 3012. Valuation of Security.

The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

— APPENDIX K —

U.S. Constitution, Fifth Amendment

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.